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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 LARRY DEAN WEATHERMAN,

10 Petitioner,

11 Case No. C24-6037-TMC-SKV

12 v.

13 SCOTT SPEER,

14 Respondent.

15 REPORT AND RECOMMENDATION

16 **I. INTRODUCTION**

17 This is a federal habeas action filed under 28 U.S.C. § 2254. Petitioner Larry Dean
18 Weatherman is currently confined at the Stafford Creek Corrections Center in Aberdeen,
19 Washington. He seeks to challenge herein the judgment and sentence entered in Clark County
20 Superior Court case number 13-1-00014-8 in 2014. Dkt. 7. That judgment is the basis of his
21 current custody. Respondent filed an answer to Petitioner's petition together with relevant
22 portions of the state court record (Dkts. 10, 11), and Petitioner filed a response to Respondent's
23 answer (Dkt. 12). Respondent argues in his answer that this Court lacks jurisdiction over the
instant petition because it is successive under 28 U.S.C. § 2244(b), and the Ninth Circuit has not
authorized the filing of a successive petition. *See* Dkt. 10.

This Court, having reviewed Petitioner's petition, Respondent's answer, and the balance of the record, concludes that it lacks jurisdiction over the petition because it is successive under § 2244(b). The Court therefore recommends the petition be dismissed.

II. BACKGROUND

On April 24, 2014, Petitioner was convicted in Clark County Superior Court on six counts of incest in the first degree. Dkt. 11, Ex. 1 at 1-2. He was subsequently sentenced to terms of 100 months confinement on each of the six counts of conviction and, based on aggravating factors found by the jury, the sentencing court imposed an exceptional sentence with the sentences on three of the counts ordered to run consecutively and three ordered to run concurrently, for a total term of 300 months confinement. *Id.*, Ex. 1 at 4-5. Petitioner appealed his convictions and sentence to the Washington Court of Appeals, and the Court of Appeals affirmed the judgment and sentence on October 27, 2015. *Id.*, Ex. 2. Petitioner thereafter sought discretionary review in the Washington Supreme Court and his petition for review was denied without comment on March 30, 2016. *Id.*, Ex. 3. The Court of Appeals issued a mandate terminating direct review on April 6, 2016. *Id.*, Ex. 4.

On October 27, 2016, Petitioner filed a personal restraint petition in the Washington Court of Appeals, and the Court of Appeals dismissed the petition as frivolous on June 12, 2017. Dkt. 11, Exs. 5, 6. Petitioner thereafter filed a motion for discretionary review in the Washington Supreme Court, and the Supreme Court Commissioner denied the motion on October 19, 2017. *See id.*, Ex. 7. Petitioner moved to modify the Commissioner's ruling and that motion was denied as well. *See id.*, Ex. 8. The Court of Appeals issued a certificate of finality in Petitioner's personal restraint proceeding on January 9, 2018. *Id.*, Ex. 9.

1 On November 4, 2020, Petitioner filed a federal habeas petition challenging his 2014
2 Clark County Superior Court judgment and sentence. *See Weatherman v. Haynes*, Case No.
3 3:20-cv-6087-JLR, Dkt. 1. That action was dismissed with prejudice on June 9, 2021, on the
4 grounds that Petitioner's federal habeas petition was time-barred under 28 U.S.C. § 2244(d). *See*
5 *id.*, Dkts. 16, 19. On January 14, 2022, the Ninth Circuit Court of Appeals denied Petitioner's
6 request for a certificate of appealability, thus concluding that action. *See id.*, Dkt. 23.

7 On July 26, 2021, after his first federal habeas petition was dismissed, Petitioner filed a
8 motion for post-conviction relief in the Clark County Superior Court. Dkt. 11, Ex. 10. The
9 motion was transferred to the Washington Court of Appeals for consideration as a personal
10 restraint petition, and the Court of Appeals dismissed the petition as time barred on April 6,
11 2023. *Id.*, Exs. 11, 15. Petitioner then filed a motion for discretionary review in the Washington
12 Supreme Court, and the Deputy Commissioner of the Supreme Court denied the motion on June
13 5, 2023. *Id.*, Exs. 16, 17. Petitioner moved to modify the Deputy Commissioner's ruling and
14 that motion was denied as well. *See id.*, Ex 18. The Washington Court of Appeals issued a
15 certificate of finality in Petitioner's second personal restraint proceeding on September 26, 2023.
16 *Id.*, Ex. 19.

17 On November 1, 2023, Petitioner filed another personal restraint petition in the
18 Washington Court of Appeals, and the Court of Appeals dismissed the petition as untimely on
19 May 15, 2024. Dkt. 11, Exs. 20, 23. Petitioner again moved for discretionary review in the
20 Washington Supreme Court, and the Deputy Commissioner of the Supreme Court denied the
21 motion on August 6, 2024. *Id.*, Exs. 24, 25. Petitioner moved to modify the Deputy
22 Commissioner's ruling and that motion was denied as well. *See id.*, Ex. 26. The Court of
23 Appeals issued a certificate of finality in that proceeding on June 17, 2024, the same date

1 Petitioner filed his motion for discretionary review in the Supreme Court. *See id.*, Exs. 24, 27.
2 The record does not explain this seeming anomaly, but it does not impact the resolution of this
3 action.

4 **III. DISCUSSION**

5 Respondent argues that Petitioner's federal habeas petition, his second such petition,
6 must be dismissed for lack of jurisdiction. Dkt. 10 at 7-8. Respondent is correct. By statute, this
7 Court is without jurisdiction to consider a second or successive habeas petition until the Ninth
8 Circuit Court of Appeals has authorized its filing. *See* 28 U.S.C. § 2244(b); Circuit Rule 22-3.
9 Section 2244(b)(3)(A) provides that *before* a second or successive habeas petition is filed in the
10 district court, "the applicant shall move in the appropriate court of appeals for an order
11 authorizing the district court to consider the application." Section 2244(b)(3)(A) thus creates a
12 "gatekeeping" mechanism at the appellate court for the consideration of second or successive
13 applications in the district courts. *See Felker v. Turpin*, 518 U.S. 651, 657 (1996). The court of
14 appeals may authorize the filing of a second or successive application for habeas relief only if it
15 determines that the applicant has made a *prima facie* showing that the application satisfies the
16 requirements set forth in 28 U.S.C. § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C).

17 It is clear from this Court's records that Petitioner filed a previous federal habeas petition
18 challenging the same Clark County Superior Court judgment and sentence as is at issue here, and
19 the petition was dismissed as time-barred under the federal statute of limitations. The instant
20 petition is therefore a second or successive one, and this Court is without jurisdiction to consider
21 it until the Ninth Circuit Court of Appeals has authorized its filing. *See* 28 U.S.C. § 2244(b);
22 *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding that dismissal of a habeas
23 petition as untimely constitutes a disposition on the merits and renders a subsequent petition

1 challenging the same conviction or sentence “second or successive” for purposes of § 2244(b)).
2 Petitioner makes no showing that the Ninth Circuit has authorized the filing of the instant
3 petition and, thus, this Court lacks jurisdiction to consider it.

4 **IV. CERTIFICATE OF APPEALABILITY**

5 A petitioner seeking post-conviction relief under § 2254 may appeal a district court’s
6 dismissal of his federal habeas petition only after obtaining a certificate of appealability from a
7 district or circuit judge. A certificate of appealability may issue only where a petitioner has
8 made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(2).
9 A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with
10 the district court’s resolution of his constitutional claims or that jurists could conclude the issues
11 presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537
12 U.S. 322, 327 (2003). Under this standard, this Court concludes Petitioner is not entitled to a
13 certificate of appealability in this matter.

14 **V. CONCLUSION**

15 Based on the foregoing, this Court recommends that Petitioner’s federal habeas petition
16 (Dkt. 7) and this action be dismissed under 28 U.S.C. § 2244(a) for lack of jurisdiction, and that
17 a certificate of appealability be denied. A proposed Order accompanies this Report and
18 Recommendation.

19 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
20 served upon all parties to this suit not later than **fourteen (14) days** from the date on which this
21 Report and Recommendation is signed. Failure to file objections within the specified time may
22 affect your right to appeal. Objections should be noted for consideration on the District Judge’s
23 motions calendar **fourteen (14) days** from the date they are filed. Responses to objections may

1 be filed by **the day before the noting date**. If no timely objections are filed, the matter will be
2 ready for consideration by the District Judge on **April 28, 2025**.

3 DATED this 7th day of April, 2025.

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S. KATE VAUGHAN
United States Magistrate Judge

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